Supreme Court, U.S.
FILED
APR 7 - 2015
OFFICE OF THE CLERK

Nos. 14-840, 14-841

IN THE

Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, et al.,

Respondents.

ENERNOC, INC. *et al.*,

Petitioners,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

CARTER G. PHILLIPS *
C. FREDERICK BECKNER III
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com
Counsel for EnerNOC, Inc.
* Counsel of Record
[Additional Counsel on Inside Cover]

April 7, 2015

MARVIN T. GRIFF
HUSCH BLACKWELL LLP
750 17th Street, NW,
Suite 900
Washington, DC 20006
(202) 378-2300
marvin.griff@huschblackwell.com
Counsel for
EnergyConnect, Inc.

MATTHEW J. CUSHING
ENERNOC, INC.
One Marina Park Drive
Suite 400
Boston, MA 02210
(617) 692-2690
mcushing@enernoc.com
Counsel for
EnerNOC, Inc.

ROBERT A. WEISHAAR, JR.
MCNEES WALLACE &
NURICK LLC
777 N. Capitol Street, NE
Suite 401
Washington, DC 20002
(202) 898-5700
rweishaa@mwn.com
Counsel for
the Coalition of MISO
Transmission Customers
and PJM Industrial
Customer Coalition

ALLEN M. FREIFELD
1801 Market Street
Philadelphia, PA 19103
(484) 534-2191
afreifeld@viridityenergy.com
Counsel for
Viridity Energy, Inc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. ORDER 745 DOES NOT SET RETAIL RATES; IT REGULATES A PRACTICE DIRECTLY AFFECTING WHOLESALE RATES	2
II. AMICI AND SUPPORTING RESPONDENTS CONFIRM THE EXCEPTIONAL IMPORTANCE OF THE QUESTION PRESENTED	7
III. THIS COURT'S REVIEW IS ESSENTIAL	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Barnhart v. Walton, 535 U.S. 212 (2002) 6
City of Arlington v. FCC, 133 S. Ct. 1863 (2013) 1, 6
Fed. Power Comm'n v. La. Power & Light Co., 406 U.S. 621 (1972) 3
Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354 (1988) 3

STATUTES

Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 7
16 U.S.C. § 824(b)(1) 2
§ 824e(a) 2

ADMINISTRATIVE DECISIONS

Demand Response Compensation in Organized Wholesale Energy Markets, Order No. 745, 134 FERC ¶ 61,187, *aff'd*,, No. 745-A, 137 FERC ¶ 61,215 (2011) 7
Demand Response Compensation in Organized Wholesale Energy Markets, Order No. 745-A, 137 FERC ¶ 61,215 (2011) 7
PJM Interconnection, LLC, 150 FERC ¶ 61,251 (2015) 10
Wholesale Competition in Regions with Organized Elec. Mkts., Order 719, 125 FERC ¶ 61,071 (2008), *aff'd*, Order 719-A, 128 FERC ¶ 61,059 (2009) 6

TABLE OF AUTHORITIES – continued

Page

OTHER AUTHORITIES

Monitoring Analytics, *The 2017/2018 RPM Base Residual Auction: Sensitivity Analyses* (July 10, 2014), *available at* http://www.monitoringanalytics.com/reports/Reports/2014/IMM_20172018_RPM_BRA_Sensitivity_Analyses_20140710.pdf... 10

PJM Interconnection, L.L.C., *Revisions to the Reliability Pricing Market*, Docket ER15-852-00 (Jan. 14, 2014), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13737155 ..... 10, 11

INTRODUCTION

The opposition brief rests on three incorrect premises: First, that "demand response" is a retail sale; second, that state regulation of demand response can replace the extraordinary economic, grid reliability and other benefits of demand response in wholesale markets; and third, that there will be no irreparable harm if this Court postpones review.

A sale of demand response resources in wholesale energy markets is not a "sale of electric energy," let alone a retail sale of energy within the States' exclusive jurisdiction. FERC correctly decided that demand response participation in wholesale energy markets directly affects wholesale rates and therefore that FERC has jurisdiction to regulate that participation. At a minimum, the FPA is ambiguous with respect to FERC's jurisdiction over demand response participation. Thus, the court below should have deferred to FERC's judgment about the scope of its jurisdiction. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013).

State regulation cannot replicate the benefits resulting from demand response participation in wholesale energy markets. The state regulatory commissions' brief explains that the decision below "leaves only the possibility for a balkanized market to develop"; that state demand response "runs into many of the barriers that prompted FERC to act"; and that "[t]he likelihood is that huge portions of demand response will simply disappear if the panel's decision is not overturned." Joint State Br. 12 & n.18.

Finally, far from being "advisory," this Court's reversal of the Circuit's jurisdictional decision is a *prerequisite* to FERC's authority to regulate demand re-

sponse in wholesale energy markets on remand of this case and thereafter. Without this Court's review, the decision below will be the last word on this question for years, with the harmful consequences already described. *See* Pet. 28-33.

ARGUMENT

I. ORDER 745 DOES NOT SET RETAIL RATES; IT REGULATES A PRACTICE DIRECTLY AFFECTING WHOLESALE RATES.

The FPA grants FERC authority to regulate "the sale of electric energy at wholesale," and "any ... practice ... affecting" wholesale rates. 16 U.S.C. §§ 824(b)(1), 824e(a). States have jurisdiction to regulate "any other sale of electric energy," *id.* § 824(b)(1)—*i.e.*, "retail" sales of electricity. FERC found, and the court of appeals agreed, that a sale of demand response resources is *not* a "sale of electric energy." App.6a, 19a. FERC found that the offering of demand response resources in organized wholesale energy markets is a practice "affecting [wholesale] rates"; again, the court of appeals agreed. App.7a, 20a.

The consequences flowing from this agreement should have been clear: FERC has jurisdiction to regulate demand response participation in wholesale energy markets as a "practice" "affect[ing]" wholesale rates. And, correlatively, because a sale of demand response in wholesale markets is not a "sale of electric energy" at all, the FPA's reservation of State authority is not implicated.

Respondents' contrary arguments lack merit.

1. There is a critical difference between directly setting a price and engaging in regulation that ulti-

mately affects a service's price. Respondents' arguments that FERC is regulating retail prices ignore that fundamental distinction.

Respondents first argue that paying an electricity user to forgo energy consumption regulates retail sales because it alters "the *effective rate* during peak hours." Opp. 18 (emphasis added). From this, respondents conclude that FERC "change[d] the rates that retail customers pay for the energy they consume" and thus impermissibly "regulate[d] retail sales." *Id.* Initially, no semantic maneuvering can alter the indisputable fact that sales of demand response resources are *not* "sale[s] of electric energy," and thus not within the States' exclusive jurisdiction. App.32a ("There was no sale") (Edwards, J., dissenting).

In any event, respondents' argument ultimately rests on the flawed position that reducing energy consumption is the same as making a retail energy purchase because reducing consumption starts a chain of events that may affect consumers' bills for retail energy purchases. Opp. 18-19. This argument incorrectly presumes that States have exclusive jurisdiction over not only retail sales of electric energy, but also practices affecting such sales. As we explained, Pet. 23, Congress did not give States "affecting" jurisdiction with respect to retail sales comparable to FERC's "affecting" jurisdiction with respect to wholesale sales. The FPA thus "withheld from [FERC] *only rate-setting authority* with respect to direct sales." *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 637-38 (1972) (emphasis added). *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 365, 372 (1988) (Mississippi could not regulate utilities' power allocations that were approved by FERC even though the State sought to do so in the

course of reviewing the prudence of an "increase in [a power company's] retail rates"); Pet. 25-27.

Respondents also argue that Order 745 regulates retail prices because "[a] regulator who wants the effective price of a product to be $15 can achieve that end not only by setting the price at $15, but also by letting another regulator set it at $20 and then paying $5 to anyone who makes the purchase, or letting another regulator set it at $10 and then paying a $5 rebate to anyone who forgoes the purchase." Opp. 24. Again, respondents conflate setting retail prices with regulating practices that may ultimately affect retail prices. Order 745 regulates demand response participation in wholesale energy markets to the extent such participation has a direct impact on wholesale prices in those markets. While wholesale prices may ultimately *affect* retail prices, as already shown, States do not have exclusive jurisdiction over practices *affecting* retail rates. Moreover, in contrast to respondents' scenario, demand response providers bid a separate service into wholesale markets and the price of that service is not triggered by changes in retail prices.

Finally, respondents' arguments treat demand response resources as simply the inverse of how a consumer purchases energy at retail. In fact, "[d]emand response providers are technologically advanced businesses" that participate in wholesale markets "by submitting legally binding, verifiable, and specific use reductions, which can lower market-clearing prices." Delaware Public Advocate Br. 10-11. Contrary to respondents, Opp. 20, this service is not simply consuming less energy. It generally involves investment in the development and installation of advanced technology that allows large businesses and institutions reliably to reduce consumption during

times of peak demand at the direction of ISOs and RTOs. That service is not a retail sale of energy.

2. Respondents claim that the effect of demand response on wholesale rates "is no more (or less) 'direct' than the effect that any retail transaction has on the wholesale markets." Opp. 22. But no retail transaction *directly* alters wholesale energy rates; demand response participation in wholesale markets does. Demand response providers bid directly into the wholesale market for electric energy. FERC's rule "applies *only when* an ISO or RTO can use the demand response resource in lieu of a generation resource to balance supply and demand, *and only when* paying a demand response resource is cost-effective under the rules' net benefits test.... That is about as 'direct' an effect and as clear a 'nexus' with the wholesale transaction as can be imagined." App. 37a (Edwards, J., dissenting).

Respondents' related contention, Opp. 20-21, that FERC manufactured demand response's effects in wholesale markets ignores reality. If peak demand decreases, the wholesale price of energy decreases, sometimes significantly. Pet. 8-10. FERC did not *create* demand response's effects in wholesale markets; FERC *recognized* the benefits of such participation in promoting competition and market efficiency and determined that demand response participation was necessary to achieving just and reasonable wholesale rates. *See* Pet. 15; *infra* pp. 6-7 (FERC began regulating demand response when ISOs and RTOs published tariffs allowing demand response to bid directly in wholesale markets).

Next, respondents incorrectly argue that FERC's "broad authority" to regulate practices "'affecting' wholesale rates" somehow does not include determining "what kinds of practices fall within FERC's 'af-

fecting' authority." Opp. 25. But FERC's judgment that a practice affects wholesale rates *is* a judgment about the scope of its jurisdiction, entitled to *Chevron* deference. *City of Arlington* 133 S. Ct. at 1868.

3. Respondents also maintain that FERC's assertion of jurisdiction should not be accorded the "particular deference" owed to an "agency interpretation of 'long standing' duration," *Barnhart v. Walton*, 535 U.S. 212, 219-20 (2002), because the matter was "in litigation" and "the full force" of FERC's assertion of jurisdiction was not felt until Order 745 was promulgated. Opp. 30. Respondents misstate the history of FERC's regulation of wholesale demand response. Through its review of ISO and RTO tariffs, FERC had been regulating demand response in wholesale markets for roughly a decade before promulgating Order 745. Pet. 11. Indeed, in Order 719, FERC had implemented reforms to "remov[e] barriers to the development and use of demand response resources in organized wholesale electric power markets," requiring ISOs and RTOs to permit aggregators "to bid demand response on behalf of retail customers directly into the organized energy market." Order 719 ¶¶ 3, 48. Thus, FERC's long-standing regulation of demand response is entitled to "particular deference."

Respondents engage in further revisionist history in arguing both (i) that FERC "grant[ed] itself the power to regulate retail transactions by 'luring' retail customers into [wholesale] markets," Opp. 20, and (ii) that Order 745 was motivated by FERC's supposed annoyance with state regulators not "mov[ing] as quickly as FERC would prefer to adopt dynamic retail rates." Opp. 18. As noted, demand response initially participated in wholesale markets through ISO and RTO tariffs to address supply shortfalls and emergencies. Moreover, in light of the inability of state

retail rates to respond promptly to increased demand, FERC had to regulate demand response *in wholesale markets* to ensure just and reasonable *wholesale rates*. Order 745-A ¶¶ 59, 61; Order 745 ¶ 57.

Finally, FERC increasingly focused on demand response after *Congress* enacted the Energy Policy Act of 2005, declaring that "unnecessary barriers to demand response participation in energy, capacity and ancillary services markets shall be eliminated." Pub. L. No. 109-58, §1252(f), 119 Stat. 594, 966. *Only FERC* can eliminate unnecessary barriers to demand response in wholesale markets.

II. AMICI AND SUPPORTING RESPONDENTS CONFIRM THE EXCEPTIONAL IMPORTANCE OF THE QUESTION PRESENTED.

Respondents suggest that the decision below will not cause significant harm. In fact, if allowed to stand, its consequences would be immediate and devastating.

FERC determined that without its regulation of demand response in wholesale markets, rates will not be just and reasonable, prices will rise and the grid will be less reliable. Pet. 29 (citing FERC orders). These consequences by themselves—seemingly doubted only by respondents—reveal the exceptional importance of the question presented. The briefs of amici and supporting respondents detail substantial harms that will follow in the wake of the decision below.

1. Respondents contend that the decision will not endanger *retail demand response programs* and suggest—contrary to FERC's judgment, historic evidence and logic—that state programs can deliver the same benefits FERC's regulation delivers. Opp. 28.

As the Joint State Brief explains, "attempting to replicate demand response at the state level runs into many of the barriers that prompted FERC to act in the first place":

> At best, the panel decision leaves only the possibility for a balkanized market to develop, where states are required to patch together individual rules for participation of demand response resources at the retail level, with no clear mechanism for monetarily incentivizing such resources to participate. Such a patchwork would operate without the currently available short-term information flow necessary to dispatch demand response consistently with grid needs and market benefits. *The likelihood is that huge portions of demand response will simply disappear if the panel's decision is not overturned.*

Joint State Br. 12 (emphasis added). Amicus NRG, a member of respondents' trade association, agrees: "State-regulated demand response programs are no substitute for FERC regulated wholesale demand response programs." NRG Br. 9-11. *See also* Electricity Consumers/Demand Response Providers Br. 13-15; Fourteen Utilities Br. 23.

Currently, retail demand response programs cannot do what FERC's wholesale programs do: "[D]emand response programs that predominate in retail markets are 'generally not considered "firm" resources,' because they are not known to grid operators or 'dispatchable,' meaning that system-wide decisions cannot be made, as they are in energy markets, based on legally-binding specific reductions." Delaware Public Advocate Br. 12 (citation omitted). Moreover, wholesale demand response has a "'much larger price impact' [than retail demand response] because it can 'set the market clearing price.'" *Id.*

Respondents further argue that the destruction of wholesale demand response programs "may benefit State demand response initiatives." Opp. 29-30 (citing state regulatory commission comments). In fact, the States—the supposed "beneficiaries"—strongly *supported* demand response participation in wholesale markets and FERC jurisdiction over such participation. Their concern with Order 745 was only that it would *overcompensate* demand resource providers and in that way impede retail programs. *See, e.g.*, Illinois Commerce Commission Comments, D.C.Cir. J.A. 293; Public Utilities Commission of Ohio Comments, D.C.Cir. J.A. 390; Organization of MISO States Comments, D.C.Cir. J.A. 451-52, 1237; N.Y. Independent System Operator Comments, D.C.Cir. J.A. 556-57. *See also* Delaware Public Advocate Br. 13 (eliminating demand response participation "'in the wholesale energy market would ... adversely affect the viability of retail price-responsive demand programs'") (quoting New Eng. Conf. Pub. Utils. Comm'rs Letter, FERC Docket RM10-17, 2-3 (July 1, 2014) (emphasis omitted)).

2. Respondents argue the decision will not be harmful because "traditional public utilities and competitive power suppliers"—*i.e.*, wholesale purchasers—will offer retail customers incentives to reduce demand, in turn, allowing utilities and other suppliers to reduce their wholesale energy purchases. Opp. 31. This is just another way of saying that some benefits of retail demand response may trickle into wholesale markets even without direct participation of demand response in wholesale markets. Congress and FERC expressly found such levels of demand response participation inadequate. Moreover, public utilities and power suppliers' business is *selling* electricity and capacity; they do not have appropriate in-

centives to procure or promote demand response. *See* Electricity Consumers/Demand Response Providers Br. 16; NRG Br. 9-10.

3. Respondents cite PJM's independent market monitor to support their claim that the decision below provides an "'opportunity to reform the rules for demand response to make them consistent with the functioning of an efficient and competitive market.'" Opp. 32 (quoting Monitoring Analytics, L.L.C., Report, *PJM State of the Market*, 221 (Mar. 12, 2015)). This same monitor estimated that removal of demand response from the 2014 capacity market (2017-18 delivery year) would result in a roughly $9 billion cost increase in electricity.[1] And, as explained above, patchwork State regulation cannot achieve these same benefits.

4. Respondents cite PJM's "package of revisions to the rules for its centralized capacity auctions" to try to diminish the harm caused by the decision below, Opp. 32—a package some respondents have *opposed* as "seriously flawed," *see, e.g.*, EPSA Comments, Docket ER15-852-000, 5-6 (Feb. 13, 2015), and that FERC has labeled "premature," *PJM Interconnection, LLC*, 150 FERC ¶ 61,251, ¶¶ 1, 33 (2015). More fundamentally, respondents ignore PJM's statement that this "package" is a "stop gap" that is "not ... superior" to PJM's current tariff.[2] Indeed, at least 72% of

---

[1] Monitoring Analytics, *The 2017/2018 RPM Base Residual Auction: Sensitivity Analyses*, 2 (July 10, 2014), *available at* http://www.monitoringanalytics.com/reports/Reports/2014/IMM_20172018_RPM_BRA_Sensitivity_Analyses_20140710.pdf.

[2] PJM Interconnection, L.L.C., *Revisions to the Reliability Pricing Market*, 2-3, Docket ER15-852-00 (Jan. 14, 2015),

PJM's demand response is provided by curtailment service providers *prohibited* from participating in wholesale markets under PJM's proposal. Answer of PJM Interconnection, L.L.C., Docket ER15-852-000, 12-13 (Mar. 4, 2015). PJM simply concludes that this package "would be superior to rules that do not recognize *any* demand response," that is, better than nothing. *Revisions to the Reliability Pricing Market*, *supra* pp. 2-3 (emphasis added).[3]

5. Finally, respondents breeze past the damage the decision below would cause if extended to capacity markets, saying it "remains to be litigated." Opp. 33. But respondents are among those who have filed complaints vigorously asserting that the decision bars demand response in capacity markets, with all the harm that result would entail. Pet. 30-31.

III. THIS COURT'S REVIEW IS ESSENTIAL.

Respondents incorrectly claim this case is a poor vehicle for review of the court of appeals' jurisdictional decision, because petitioners failed to request review of the court's vacatur of FERC's compensation regime. Opp. 35.

An opinion by this Court addressing FERC's jurisdiction would not be "advisory." *Cf.* Opp. 35. This Court's review of that judgment is essential to future FERC regulation on this subject, including in this

---

available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13737155.

[3] Contrary to respondents, Opp. 31, CAISO observes that even under the most "narrow reading" of the D.C. Circuit's opinion, the "market would become less efficient" because demand response providers would not be permitted to "directly compete with generation providers in the markets for energy." CAISO Br. 13-14.

case. If the D.C. Circuit's decision is allowed to stand, FERC cannot propose a new compensation regime for demand response in energy markets. If this Court reverses the D.C. Circuit's jurisdictional holding, however, FERC can "properly consider—and engage—[the dissenting Commissioner's] ... arguments" that Order 745 overcompensates demand response resources, as the Circuit suggested. App. 14a. Accordingly, there is no sense in which this Court's opinion would be advisory.[4]

Respondents also say that this Court may have another opportunity to consider the question presented, Opp. 37, ignoring the intervening harm resulting from FERC's current inability to regulate demand response in wholesale energy markets and the crippling uncertainty gripping capacity markets. Pet. 29-31. The FERC proceeding involving capacity markets—which respondents cite in opposing the petition, Opp. 33—would take years to reach this Court.[5]

---

[4] Respondents vaguely argue that petitioners sought to "divert attention away from FERC's flawed compensation scheme," Opp. 35, because those flaws somehow reveal that demand response is a retail transaction, Opp. 35-36. The dispute about the compensation scheme sheds no light on whether a sale of demand response is a retail sale.

[5] If this Court were concerned that it must consider the compensation regime to have jurisdiction, it could modify the question presented. *See* Pet. 21 n.3; FERC Pet. 35-36.

CONCLUSION

The petition should be granted.

Respectfully submitted,

MARVIN T. GRIFF
HUSCH BLACKWELL LLP
750 17th Street, NW,
Suite 900
Washington, DC 20006
(202) 378-2300
marvin.griff@husch
blackwell.com
Counsel for
EnergyConnect, Inc.

CARTER G. PHILLIPS *
C. FREDERICK BECKNER III
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com
Counsel for
EnerNOC, Inc.

ROBERT A. WEISHAAR, JR.
MCNEES WALLACE & NURICK LLC
777 N. Capitol St., NE
Suite 401
Washington, DC 20002
(202) 898-5700
rweishaa@mwn.com
Counsel for
the Coalition of MISO
Transmission Customers and PJM Industrial
Customer Coalition

MATTHEW J. CUSHING
ENERNOC, INC.
One Marina Park Drive
Suite 400
Boston, MA 02210
(617) 692-2690
mcushing@enernoc.com
Counsel for
EnerNOC, Inc.

ALLEN M. FREIFELD
1801 Market Street
Philadelphia, PA 19103
(484) 534-2191
afreifeld@viridityenergy.com
Counsel for
Viridity Energy, Inc.

April 7, 2015

* Counsel of Record